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IN THE

Supreme Court of the United States

No. 418

OCTOBER TERM, 1970

H. H. ROBERTSON CO., AND LIBERTY MUTUAL INSURANCE CO.,
Appellants,

v.

KENNETH NEWBERRY, GUARDIAN OF LARRY NEWBERRY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS OR AFFIRM

The Appellee moves the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Michigan on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Hearing Referee of the Michigan Workmen's Compensation Department is set forth in Appendix A of Appellants' Jurisdictional Statement. The opinion on review of the Appeals Board is set out as Appendix B of the Jurisdictional Statement. The unreported order of the Michigan Court of Appeals is set forth in Appendix C, and that of the Michigan Supreme Court in Appendix D.

QUESTION PRESENTED

Whether the application of an amended state workmen's compensation statute, in accordance with legislative intent, extending maximum medical benefits from four six-month periods to an unlimited number of six-months periods, to cover medical expenses incurred subsequent to the amendment by a permanently and totally disabled employee whose original injury occurred prior to the amendment, bears such an attenuated relation to the economic interests of the state and the general welfare of its people, and is so arbitrary, capricious, and clearly unreasonable, as to constitute an impairment of the obligation of contract and a deprivation of property without due process of law, in violation of Article I, Section 10 and the Fourteenth Amendment to the Contitution of the United States?

STATUTES INVOLVED AND STATEMENT OF THE CASE

On January 23, 1951, Appellee's ward, Larry Newberry, while working as an apprentice structural steel worker for Appellant employer, fell from a scaffolding to the street below and suffered injuries from which he has not and probably will never recover. He was hospitalized until October, 1951 for multiple fractures and other injuries to the head, body, and legs, and thereafter lived with and under the care of his parents. After his discharge, Larry began to manifest symptoms of mental illness, which became progressively pronounced. He received voluntary compensation benefits from Appellant insurer in the amount of twenty-four dollars per week for a period of 500 weeks, and subsequently in 1964 was adjudged permanently and totally disabled by reason of incurable insanity and awarded further benefits from the employer and the Second Injury Fund.

In July, 1966, following the death of Larry's mother, his father, Joseph (then his guardian), found himself no longer able to provide Larry with adequate care. Subsequently, Larry was admitted to the psychiatric ward of Herman Kiefer Hospital and then committed by the Wayne County Probate Court to Northville State Hospital, where he has been a patient ever since. Pursuant to administrative hearings to determine further liability, in May, 1968, the Hearing Referee found that Larry continued to be permanently and totally disabled by reason of incurable insanity; the decision specified that Appellants were obliged by the Workmen's Compensation Act, as amended, to provide all reasonable and necessary medical care during Larry's lifetime or until further order of the Depart-

ment. Appellants' appeal of this decision was subsequently dismissed by the Workmen's Compensation Appeal Board. The Michigan Court of Appeals denied Appellants' application for leave to appeal, and the Michigan Supreme Court denied their application for leave to appeal from the order of the Court of Appeals.

Appellants' appeal in the instant case concerns their liability under the Michigan Workmen's Compensation Act, as amended, for medical benefits. At the time of Larry Newberry's injuries in 1951, the applicable provision was P.A. 1949, No. 238, which provided for a maximum of four six-month periods of medical benefits. In 1955, the provision was amended by P.A. 1955, No. 250, set forth at page four of the Jurisdictional Statement, to allow for an unlimited number of six month periods of medical benefits. The Michigan Supreme Court, in *Lahti v. Fosterling*, 357 Mich 578, 99 N.W. 2d 490 (1959), looking "to the facts and circumstances surrounding the adoption of the amendment," held that the legislature had intended that the amendment be given retroactive application to injuries occurring prior to its enactment and that such application was constitutional. The court further observed that

> "'"(w)here a section of a statute is amended, the original ceases to exist, and the section as amended supercedes it and becomes a part of the statute for all intents and purposes as if the amendments had always been there."'" *Lahti, supra,* at 495.

In denying Appellants leave to appeal, the Michigan Court of Appeals relied upon *Lahti v. Fosterling, supra,* as authority. The Michigan Supreme Court, in denying Appellants' leave to appeal, impliedly did not wish to re-

view again the 1955 statute, involving the same issues it had decided in 1959.

On appeal, Appellants argue that P.A. 1955, No. 250, as construed in *Lahti* and as applied to them in the instant case, constitutes an impairment of the obligation of contract, in violation of Article I, Section 10, as well as a deprivation of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States. They pray that probable jurisdiction be noted, that the case be accepted for oral argument, and that the decision below be reversed.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

I.

INASMUCH AS APPELLANT INSURER ASSUMED THE OBLIGATION, UNDER THE REMEDIAL WORKMEN'S COMPENSATION STATUTE, OF DISCHARGING THE LIABILITY OF APPELLANT EMPLOYER TO ITS INJURED EMPLOYEES, AS MIGHT FROM TIME TO TIME BE DETERMINED BY THE STATE LEGISLATURE, APPELLANTS CANNOT COMPLAIN THAT A LEGISLATIVELY INTENDED AND JUDICIALLY SANCTIONED RETROACTIVE APPLICATION OF AN AMENDMENT TO THE WORKMEN'S COMPENSATION STATUTE, A REGULATION REASONABLY NECESSARY TO SECURE THE GENERAL WELFARE OF THE PUBLIC PURSUANT TO THE EXERCISE OF THE STATE'S POLICE POWER, VIOLATES THEIR CONSTITUTIONAL RIGHT AGAINST IMPAIRMENT OF CONTRACT.

A. The Michigan Workmen's Compensation Law Rests Upon Status Rather Than Contract, And Appellant's Liability Under The Act Is Thus Not Limited To Such Hypothetical Benefits As Might Have Been Due At The Time Of The Issuance To Appellant Employer Of Appellant Insurer's Insurance Policy.

There is nothing immutable about judicial construction of the basis for any given legislation. Although the Supreme Court of Michigan, at the very dawn of American workmen's compensation legislation, did sugest that its statute rested upon contract,[1] the case in which this view

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[1] *Detloff v. Hammond Standish & Co.*, 195 Mich 117, 161 N.W. 949 (1917).

was advanced has not been cited as controlling since 1922.[2] Deferring to the wisdom of the Supreme Court of the United States, the Michigan Supreme Court held in *Crilly v. Ballou,* 353 Mich 303, 91 N.W. 2d 493 (1958) that its Workmen's Compensation statute was not grounded in contract at all, but rather in the power of the state to regulate the employer-employee relationship in the public interest. Quoting with approval the opinion of this Court, through Justice Sutherland, in *Cudahy Packing Company of Nebraska v. Parramore,* 263 U.S. 418, 423 (1923), the Michigan court said that liability under

> "'*Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract;* that is, upon the conception that the injured workman is entitled to compensation for an injury in the service of an industry to whose operations he contributes his work * * *.'" *Crilly, supra,* at 496. (Emphasis added.)

Thus, the Michigan Supreme Court held in *Lahti v. Fosterling, supra,* that the application of the 1955 amendment to the Workmen's Compensation Act, P.A. 1955, No. 250, to medical expenses incurred subsequent to 1955 by an employee injured prior to 1955 did not involve any question of unconstitutional impairment of contract. Observing that since the "'amendment in question was enacted in the exercise of the police power of the State and hence violates neither its constitution nor the Federal Constitution,'" the court held that the defendant employer, by electing to come under the coverage of workmen's compensation and accept its benefits, had also chosen to accept "'such amendments to the act as the legislature might deem proper to make.'" *Lahti, supra,* at 496, 497, 498. The

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[2] *Fritz v. Rudy Furnace Co.,* 218 Mich 324, 188 N.W. 528 (1922).

court declared further that defendant employer had no vested right to the continuing application of the pre-1955 statutory provisions as to medical benefits.

> "The right which defendants claim sprang from the kindness and grace of the legislature. It is the general rule that that which the legislature gives, it may take away. A statutory defense, or a statutory right, though a valuable right, is not a vested right, and the holder thereof may be deprived of it." *Lahti, supra,* at 495.

The finding that the liability of the employer and his insurer under a workmen's compensation statute is independent of considerations of contract impairment was also advanced by the Supreme Court of Wisconsin in *Douglas County v. Industrial Commission,* 275 Wis. 309, 81 N.W. 2d 807 (1957). Holding that neither the Contract nor the Due Process Clauses applied to legislation retroactively taking from a county the right to offset, against workmen's compensation death benefits due to the widow of a county highway department employee, the amount of benefits payable to her through the state retirement fund, the Wisconsin court said:

> "'when an insurance company undertakes to write workmen's compensation insurance, it assumes the employer's obligation to pay compensation. *The measure of its liability under its policy and the statute is the employer's liability to the injured employee.*' [Court's emphasis] * * * Therefore, when an insurance company issues a policy of workmen's compensation insurance * * *, its obligation is to discharge the full liability of the insured [employer] for workmen's compensation benefits, *not merely such hypothetical benefits as may have been due under the statutes as they stood at the time the policy was issued or when some accident occurred.* [emphasis added] In other words, the company's

> contract under its policy is to pay whatever workmen's compensation benefits the legislature may have seen fit to impose upon the insured * * *. When the policy of coverage is so construed, there is no question of interference with vested rights, or impairment of the obligation of a contract, presented here." *Douglas County, supra,* at 812.

Thus, in the instant case, Appellants' reliance upon Article I, Section 10 of the Constitution of the United States is misplaced. It is significant that at no point in their Jurisdictional Statement do Appellants refer to the specific provisions of any existing contract allegedly being impaired. Nor, if there is such a contract, do they demonstrate that it does not fix liability according to prevailing public policy, as do the workmen's compensation policies of other insurers in Michigan. In any case, as the Supreme Court of Ohio aptly noted, "the exercise of the police power cannot be headed off by the making of contracts reaching into the future."[3]

B. The Michigan Workmen's Compensation Act Is Remedial, Whether It Is Grounded In Contract Or Not, And As Such, Is Within A Class Of Legislation Held By This Court To Be Susceptible To Retroactive Modification.

This Court, in a landmark decision, *Home Building & Loan Association v. Blaisdell,* 290 U.S. 398 (1934), had occasion to consider the relationship between retroactive legislation and Article I, Section 10 of the Constitution, forbidding the impairment of the obligation of contract. Sustaining the Minnesota Mortgage Moratorium Act,

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[3] *Benjamin v. City of Columbus,* 167 Ohio St. 103, 146 N.E.2d 854 (1957).

which authorized state courts to extend the period of redemption from foreclosure sales "for such additional time as the court may deem just and equitable," this Court observed that the prohibition of the Contract Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Blaisdell, supra,* at 428. Having thus determined that no touchstone existed by which the constitutionality of all retroactive regulation of contracts could be judged with precision, this Court created the now well-known distinction between retroactive modification of contractual rights and of contractual remedies; without passing on the contitutionality of the former, the Court held that " 'it is competent for the States to change the form of the remedy, or to modify it otherwise, provided no substantial right secured by the contract is thereby impaired.' " The test ultimately became "one of reasonableness, and of that the legislature is primarily the judge." *Blaisdell, supra,* at 430. In construing the Minnesota statute in question, the Court noted that it was of an emerency and temporary nature, but, as it made clear in *City of El Paso v. Simmons,* 379 U.S. 497 (1965), these conditions were not in themselves necessary to sustain the constitutionality of the act. Of equal or greater importance were the reasonableness of the statute and the necessity presented "for the protection of a basic interest of society." *Blaisdell, supra,* at 445.

Michigan is among the several states which have made the determination that its Workmen's Compensation statute is remedial in character and is "enacted primarily for the benefit of injured employees and not injured employers." *Wilson v. Doehler-Jarvis Div. of National Lead Co.,* 358 Mich 226, 100 N.W.2d 226, 228; *Lahti v. Fosterling, supra,* at 494, 496; *accord, McLain v. Carolina Power & Light Company,* 172 F. Supp. 273, 275 (D. S.C. 1959); *Gilligan v. International Paper Co.,* 24 NJ 230, 131 A.2d

503, 506 (1957); *Dupree v. Barney,* 193 Pa Super. 331, 163 A.2d 901, 904 (1960); *Gill v. Krupec,* 184 Neb 436, 168 N.W.2d 377, 379 (1969); *Dunlap v. Industrial Commission,* 90 Ariz 3, 363 P.2d 600, 602 (1961); *McGehee Hatchery Company v. Gunter,* 373 S.W.2d 401, 403 (Ark 1963); *B. W. Sales Company v. Industrial Commission,* 35 Ill 2d 418, 220 N.E.2d 405, 407 (1966); *Riley v. Perkins,* 282 Ala 629, 213 So. 2d 796, 798 (1968). The reasonableness of the determination is readily apparent; it is now trivial to observe that under workmen's compensation statutes, injured workmen surrender their common law remedies arising out of actions for damages, pain, and suffering, sounding in tort, in return for the relative security of guaranteed, but more modest, compensation for loss of earning capacity due to industrial accident. The liability of employer and insurer is not fixed by a contractual agreement between the two, but by the legislature, and thus there are created no vested substantive rights in the employer and his insurer upon which subsequent legislative modifications of the employee's statutory remedies may infringe. In fact, workmen's compensation legislation falls squarely within the definition of remedial legislation propounded by the Supreme Court of Iowa.[4] "Legislation providing the means or method whereby causes of action may be effectuated, wrongs be redressed, and relief obtained is remedial."

Therefore, it is immaterial whether liability under the Michigan Workmen's Compensation Act is grounded in contract or the sovereign power of the state to protect the welfare of its people. In either case, P.A. 1955, No. 250 affects only remedies, which this Court has held to be capable of retroactive modification.

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[4] *Schmitt v. Jenkins Truck Lines, Inc.,* 149 N.W.2d 789, 792 (Iowa, 1967).

C. The Application Of P.A. 1955, No. 250 To The Medical Expenses Of Appellee's Ward, In Furtherance Of The Humanitarian Purposes Of The Workmen's Compensation Act Even If Held To Affect Substantive Contractual Rights, Would Escape Constitutional Offensiveness As A Valid Safeguarding Of The Vital Interests Of The Public.

In *Blaisdell,* this Court, through its emphasis upon the great discretion accorded the state in its exercise of the police power, laid the groundwork for the finding that a state may through legislation retroactively modify substantive contractual rights and obligations.

> "Not only is the constitutional provision [against impairment of contracts] qualified by the measure of control which the state retains over remedial processes, but the state also continues to possess authority to safeguard the vital interests of its people. * * * Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. * * * 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them. The contract will carry with it the infirmity of the subject matter.'" *Blaisdell, supra,* at 434, 437, 438.

Thus, the language of the Court suggested that the state's power to legislate in the public interest is independent of, and unqualified by, its power retroactively to modify contractual remedies. The suggestion was made explicit in *City of El Paso v. Simmons, supra.* Holding that a Texas statute, retroactively limiting the obligation of the state to reinstate lands forfeited under public land sale contracts for nonpayment of interest, did not violate

the Contract Clause, the Court, through Justice White, declared that "it is not every modification of contractual promise that impairs the obligation of contract, any more than it is every alteration of existing remedies that violates the contract clause." *City of El Paso, supra,* at 506 507. Citing with approval the above-quoted language in *Blaisdell,* the Court concluded that the

> "'economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts: * * *The State has the 'sovereign right * * * to protect the * * * general welfare of the people * * *. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.'" *City of El Paso, supra,* at 508, 509.

After *City of El Paso,* then, the Court's rule is that contractual rights, as well as remedies, may be modified retroactively, without doing violence to the Contract Clause, if in the judgment of the legislature the economic interests of the state or the general welfare of its people require such action. Nor is a state bound by archaic or obsolete notions as to what forms of state regulation in the public interest are proscribed by Article I, Section 10. For in the words of the late Chief Justice Hughes, "[i]t is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time." *Blaisdell, supra,* at 442.

It is not disputed by Appellants that, as construed by the Supreme Court of Michigan, the intent of the legislature was that P.A. 1955, No. 250, extending medical benefits, was to be applied retroactively to medical expenses incurred after 1955 arising out of injuries occur-

ring prior to 1955. Appellants argue only that such an amendment, as thus construed, is unconstitutional. Nonetheless, the legislature was accorded "wide discretion * * * in determining what is and what is not necessary," and was acting well within this discretion when it concluded that a retroactive application of the amendment was necessary to bring about the humanitarian purpose for which the Act was originally created—placing upon industry, and ultimately the consumer, the cost of injury to its workmen, the victims of a vast and often impersonal system of industrial output. *Lahti, supra,* at 493. This legislative judgment has been echoed in the holdings of several other state courts. "These Compensation Acts are entitled to and have universally received a liberal construction from the courts. The humanitarian objects of such laws should not, in the administration thereof be defeated by overemphasis on technicalities—by putting form above substance." *Parrish Esso Service Center v. Adams,* 374 S.W. 2d 468, 471 (Ark 1964); *accord, Kiger v. Idaho Corporation,* 85 Idaho 424, 380 P.2d 208, 212 (1965). "[W]orkmen's Compensation laws [should] be liberally construed in favor of extending their benefits." *Subsequent Injuries Fund v. Industrial Accident Commission,* 31 Cal Rptr. 477, 382 P.2d 597, 598 (1963); *accord, Riley v. Perkins, supra,* at 798. Thus, the application of the Workmen's Compensation Act, as amended, to the medical expenses of Appellee's ward, is not violative of the Contract Clause, even if it were held that contractual rights and obligations were somehow affected.

II.

THE MICHIGAN WORKMEN'S COMPENSATION ACT, AS AMENDED, BEARS A REAL AND SUBSTANTIAL RELATION TO ITS OBJECT—PROMOTING AN EQUITABLE DISTRIBUTION OF THE ECONOMIC BURDEN OF INDUSTRIAL INJURY—AND, AS SUCH, IS NOT SO ARBITRARY, CAPRICIOUS, OR CLEARLY UNREASONABLE AS TO DEPRIVE APPELLANTS OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In another landmark case, *Nebbia v. New York,* 291 U.S. 502 (1934), this Court repudiated the policy established by the *Lochner* decision in 1905, of substituting its judgment for that of the several state legislatures as to the wisdom and propriety of particular economic and social regulations.[5] Its current position was definitely expressed by Justice Roberts, writing for this Court in *Nebbia.*

> "[*R*]*ights* * * * *of the citizen to exercise exclusive dominion over property and freely to contract about his affairs, and* * * * *of the state to regulate the use of property and the conduct of business, are always in collision.* No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint, *the private right must yield to the public need.*
>
> "The * * * Fourteenth [Amendment], as respects state action, do[es] not prohibit governmental regulation for the public welfare. [It] merely con-

[5] It should be noted that three of the four cases cited by Appellants, at page ten of the Jurisdictional Statement, in support of their due process argument, were decided prior to *Nebbia*, in the heyday of substantive due process. The fourth decision, *Paramino*, upheld the constitutionality of the act in question.

> dition[s] the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And *the guarantee of due process * * * demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.*" *Nebbia, supra,* at 524, 525. (emphasis added)

Any doubt concerning this Court's unwillingness to reenter the swamp of substantive due process was removed by *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483 (1955), which, through Justice Douglas, declared that

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or *out of harmony with a particular school of thought.*" *Williamson, supra,* at 488. (emphasis added)

This clear statement renders irrelevant Appellants' observation that Michigan is in the minority in regard to the issue in the instant case. Those states clearing the way for the rest in the field of social and economic legislation have always been in the minority—at least for a time. Indeed, the doctrine that the states should act as laboratories for social and economic experimentation itself encourages such venturing forth.

In any case, the class of workmen's compensation legislation, of which P.A. 1955, No. 250 is an example, has long since been protected by this Court from constitutional attack. In *Cudahy,* this Court said that workmen's compensation legislation, tending

> "to promote a more equitable distribution of the economic burden in cases of personal injury or death resulting from accidents in the course of industrial employment, is a matter of sufficient public concern [citations omitted] to escape condemnation as arbitrary, capricious, or clearly unreasonable." *Cudahy, supra,* at 423.

P.A. 1955, No. 250 clearly has the purpose of promoting "a more equitable distribution of the economic burden" of industrial injury. It explicitly removes the cost of a remaining lifetime of hospitalization and despair from the shoulders of the guardian-brother of an unfortunate workman, and places the burden where it belongs—on the industry which bears legal and moral responsibility for that shattered life. "The employers who were happy to be relieved of the old liabilities have sought by legalistic approach of narrow and limited construction of the act to defeat its humanitarian purposes." *Lahti, supra,* at 494. Let them not succeed in eviscerating an act, which, for 15 years, has fulfilled the original promise of workman's compensation, on the basis of which thousands of claims have been paid and related contractual arrangements established, and for which Appellants through the upward revision of premium rates, have had ample time to prepare. Any change in the interpretation or legal effect of the statute at this juncture would only confound established relationships and result in a windfall to the insurance industry.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Michigan.

Respectfully submitted,

JOHN T. ROGERS
Attorney for Appellee
404 Pontiac State Bank Building
Pontiac, Michigan 48058
(313) 334-0951

APPENDIX

1. Article I, Section 10, to the Constitution of the United States of America provides in part:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ".

2. Amendment XIV to the Constitution of the United States of America:

> ". . . nor shall any State deprive any person of . . . property, without due process of law; . . . ".